

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ROB EVANS)	FOIA Control No. 21-287
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2002

Released: August 2, 2002

By the Commission:

1. The Commission has before it an application for review filed by Rob Evans seeking review of the decision of the Office of General Counsel (OGC) granting in part and denying in part his Freedom of Information Act (FOIA) request for records related to a July 24, 2001, meeting between FCC Commissioner Kathleen Q. Abernathy and British Secretary of State for Trade and Industry Patricia Hewitt. For the reasons stated below, we deny the application for review.

2. Mr. Evans was provided with copies of messages from the British Embassy (with personal telephone numbers redacted pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6)); copies of entries on Commissioner Abernathy's calendar and her staff's calendar recording the appointment with the Secretary; Commissioner Abernathy's letter to the Secretary following their meeting; and a background paper prepared for Commissioner Abernathy.¹ Portions of a staff briefing paper prepared for Commissioner Abernathy were withheld pursuant to the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Mr. Evans sought review of the withholding of the portions of the briefing paper.²

3. FOIA Exemption 5 permits the withholding of materials in order to encourage open, frank discussions on matters of policy between subordinates and superiors.³ Documents commonly encompassed by the deliberative process privilege include recommendations that, if released, would likely "stifle honest and frank communication within the agency."⁴ To fall under the protection of Exemption 5, a document must be predecisional and must be a direct part of the deliberative process.⁵ The predecisional character of records does not hinge on a specific agency final decision; rather, the record must simply have been part of the deliberative process.⁶ The briefing paper meets both these criteria.⁷

¹ See letters from Susan H. Steiman, Associate General Counsel, FCC, to Rob Evans (Oct. 3 and 5, 2001) (FOIA Control No. 21-287).

² See letter from Rob Evans (dated Oct. 12, 2001, rec'd Mar. 18, 2002) (Application for Review).

³ E.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980) (Coastal States).

⁴ Id.

⁵ Id. at 868.

⁶ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 n.18 (1975); Access Reports v. Department of Justice, 926 F.2d 1192, 1196 (D.C. Cir. 1996).

⁷ E.g., Access Reports, 926 F.2d at 1196-97; Hunt v. United States Marine Corps., 935 F. Supp. 46, 52 (D.D.C. 1996).

FCC staff prepared the paper for Commissioner Abernathy to provide her with background concerning Secretary Hewitt and issues that might arise in their meeting. It enabled the Commissioner to discuss her upcoming meeting with staff to decide what issues should be discussed or might be raised. OGC properly redacted those portions of the briefing paper that contained advice and policy positions for the Commissioner to consider, and properly released purely factual portions of the paper.⁸

4. Mr. Evans argues that once any related decision has been made, the redacted portions of the briefing paper should be withheld only if the publicly disclosed expression of views differs from the view in the record. As noted, to qualify for protection under Exemption 5, it is not necessary that there be a final agency decision with respect to the deliberative materials.⁹ In any event, a record does not lose Exemption 5 protection once the deliberative process is at an end unless the materials have been expressly adopted or incorporated into a decision.¹⁰ Express adoption or incorporation of the briefing paper has not occurred here.

5. Finally, Mr. Evans requests that, under policies reflected in a 1993 Department of Justice Memorandum, the briefing paper be released as a matter of discretion because no foreseeable harm that would result.¹¹ As discussed above, we conclude that release of the withheld materials would harm the deliberative process and is properly withheld under Exemption 5.¹² Therefore, we do not agree that the redacted materials should be released as a matter of our discretion.

6. IT IS ORDERED that Rob Evans' application for review is DENIED. Mr. Evans may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps and Martin.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸ Coastal States, 617 F.2d at 867.

⁹ See footnote 6, supra.

¹⁰ Id. at 866.

¹¹ Application for Review, *referring to* Attorney General's Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act (Oct. 4, 1993) (1993 FOIA Memo).

¹² See Michael Ravnitzky, 16 FCC Rcd 21745, 21748 (2001) ("Discretionary release of these Exemption 5 materials would diminish the quality of the deliberative process in FOIA proceedings."). We note that the 1993 FOIA Memo, *supra* n.11, has been superceded by a new Attorney General FOIA Memorandum. See Memorandum for Heads of All Federal Departments and Agencies from Attorney General John Ashcroft (Oct. 12, 2001) (FOIA decisions must have a "sound legal basis" and not "present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records").